In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1231

JOHN ROBERT OWENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was convicted on insufficient evidence and that he was prejudiced by submission of the indictment to the jury during its deliberations.

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of attempting to interfere with the administration of the internal revenue laws by causing the forcible rescue of property seized by the Internal Revenue Service ("IRS"), in violation of 26 U.S.C. 7212 (b).[1] He was sentenced to a term of one years' imprisonment. The court of appeals affirmed (Pet. App. A).

[1]Petitioner was acquitted by the jury on a charge of intimidating and impeding IRS officers in their official duties, in violation of 26 U.S.C. 7212(a).

1. Petitioner is president and a stockholder in Owens Textiles, Inc. of Alamance County, North Carolina (Tr. 130, 145). At the time of the pertinent events, the company owed to IRS several quarterly tax accounts.[2] On December 6, 1973, three IRS agents drove to the company's plant with a levy to enforce collection of the account owed for the quarter ending June 30, 1973, in the amount of $9,135.60. These officials included Cranford, the local agent; Wilson, his supervisor; and Martin, who had been ordered to assist in the enforcement. Cranford had unsuccessfully attempted for approximately six weeks to obtain collection (Tr. 71). Upon arrival at the plant, the agents went to the company office and asked the secretary for petitioner. When she was unable to locate him, Cranford explained the purpose of the visit, read the levy, and gave her a copy. The three agents then went to the parking lot to identify and seize several of the company's vehicles. They did so by placing official United States Government warning stickers on the vehicles.[3] At this point, petitioner arrived and said to Cranford (Tr. 36): "What are you trying to do, put me out of business?"

Cranford said that the matter was out of his hands and was being handled by his supervisor. Petitioner then asked Wilson for additional time in which to pay the liability, but Wilson said that enforcement action would be taken that day.

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[2]The company had repeatedly failed to pay the withholding (employment and Social Security) taxes from the time of its formation in 1972.

[3]The sticker bears the following legend: "SEAL, WARNING UNITED STATES GOVERNMENT SEIZURE. This property has been seized for nonpayment of internal revenue taxes, by virtue of levy issued by the District Director of Internal Revenue. All persons are warned not to remove or tamper with this property in any manner, under severe penalty of the law."

While this discussion was taking place, another truck arrived. When Wilson climbed into its cab to place the official warning sticker on the windshield, petitioner ran from the office and said that he needed the truck for local deliveries. Wilson replied that all of the vehicles were under government seizure. At this point, petitioner, who appeared emotionally upset (Tr. 24, 86, 91), told the agents: "I don't want to kill anybody, but you're taking everything that I've got, and I don't see that I have anything to lose" (Tr. 24, 26, 56, 63, 90). He also made a menacing gesture[4] that caused the agents to fear that he had a gun and would use it (Tr. 26, 64, 91). Acting in accordance with established agency policy, the agents immediately left without completing their previously-made arrangements to have the vehicles towed away. Wilson reported the incident to his superiors, and later in the day an inspector from IRS's Internal Security Division came to Burlington to investigate the incident and to protect the IRS employees (Tr. 236-237).

The same day, petitioner went to the IRS office in Burlington and paid $1,200 on the delinquency. He asked Wilson: "Now what are you going to do?" Wilson replied that the day's events had already been reported to the district office in Greensboro and that it was "out of his hands" (Tr. 28). According to Wilson, petitioner said "that whatever happened to him would be a result of what I told on him, and that he wanted me to know that he would hold me personally responsible for whatever happened to him" (Tr. 29).

The next day, the IRS investigator arrested petitioner on a charge of endeavoring to intimidate and impede the three IRS officers by threats of force, in violation of 26 U.S.C. 7212(a); the agents returned to the plant to remove the vehicles that had been seized the previous day

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[4]As petitioner spoke, he stuck his right hand into his right rear pants pocket, and, with his left hand, waved back two employees approaching the area.

and found that they were gone. Petitioner was then indicted for forcibly rescuing the seized vehicles, in violation of 26 U.S.C. 7212(b).

At trial, petitioner denied making threats, claimed at first to have "no idea" who moved the trucks, but then added that some of the truck drivers probably did. He admitted knowing that local deliveries were made after December 6.

2. Tested by traditional standards (*Glasser* v. *United States*, 315 U.S. 60, 80), the evidence was sufficient to support petitioner's conviction. As this Court has stated, "the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." *Holland* v. *United States*, 348 U.S. 121, 140.

Given the fact that the seized vehicles were removed from the company premises, the task before the jury was to weigh the probability of petitioner's guilt against the likelihood that someone else was responsible for their removal. The evidence established that petitioner had sole and complete authority for the company's activities. It is a reasonable inference that he was the only person possessing the authority to cause the rescue. Petitioner's motivation to do so was amply demonstrated by his outbursts in the parking lot and in the IRS office. The vehicles were removed within 24 hours of his confrontation with the agents—a short enough time span for the jury to conclude that petitioner had not "cooled off."

Petitioner erroneously invokes *Thompson* v. *Louisville*, 362 U.S. 199 (Pet. 12-15). *Thompson* stands for the proposition that a conviction "totally devoid of evidentiary support" violates due process. *Ibid.* Accord, *Douglas* v. *Buder*, 412 U.S. 430, 432; *Vachon* v. *New Hampshire*, 414 U.S. 478, 480. But that principle applies only where

the record contains no evidence from which the fact-finder might reasonably infer the existence of the necessary elements of the offense. This is not such a case.

3. Petitioner's claim (Pet. 11-19) that there was no evidence of use of force within the meaning of 26 U.S.C. 7212(b) is also without merit. It has been held that "forcible rescue" is not limited to proof of force against persons and includes the removal and destruction of seizure tags and removal of seized property. *United States* v. *Scolnick*, 392 F. 2d 320, 327 (C.A. 3), certiorari denied *sub nom. Brooks* v. *United States*, 392 U.S. 931.

4. Petitioner's contention (Pet. 19-25) that the court abused its discretion in permitting the jury to take the indictment into the jury room is insubstantial. See *United States* v. *Downen*, 496 F. 2d 314, 320 (C.A. 10), certiorari denied, 419 U.S. 897. The jury was instructed that the indictment "is not evidence of any kind against the accused" (Tr. 251) and, as petitioner acknowledges (Pet. 22), no court of appeals has held sending the indictment to the jury to be prejudicial error.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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[5]Petitioner's acquittal on one of the two counts militates against any claim of inherent prejudice.